No. 85-535

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

QUINAULT INDIAN NATION, ET AL., PETITIONERS

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Washington may challenge the continuation of a five-year experiment, designed to probe for the maximum sustained harvest and escapement levels for fall chinook on the Queets, Hoh, and Quillayute Rivers, on the ground that the fixed harvest premise of the probing experiment infringes on the State's right to dedicate its share of the harvestable runs to non-harvest uses.

2. Whether the court of appeals erred by construing the district court's decision as an appealable final order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 761 F.2d 1404. The opinion of the district court (Pet. App. C1-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1985, and a petition for rehearing was denied on June 28, 1985 (Pet. App. B1). The petition for a writ of certiorari was filed on September 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves one facet of the longstanding controversy between treaty and nontreaty fishermen over the management and allocation of Pacific Northwest anadromous fish pursuant to the so-called "Stevens Treaties."[1]

[1]Treaty of July 1, 1855 and Jan. 25, 1856 (Olympia), United States-Qui-nai-elts-Quil-leh-ute Indians, 12 Stat. 971 *et seq.*; Treaty of June 9, 1855 (Yakimas), United States-Yakima Indians, 12 Stat. 951 *et seq.*;

See *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), further proceedings, 459 F. Supp. 1020 (W.D. Wash.), aff'd, 573 F.2d 1123 (9th Cir. 1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*, 443 U.S. 658 (1979).

In particular, this case involves the question of salmon escapement on the Queets, Hoh, and Quillayute Rivers in northwestern Washington. The problem of proper spawning escapement is a complex one: both fisheries biologists and past court decisions have recognized that, in limited instances, too many spawners can be as harmful to the reproductive success of a run as too few. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 664 ("fish runs may be harmed by harvesting either too many or too few of the fish returning to spawn").

In 1982 and 1983, the district court's Fishery Advisory Board (FAB) (see Pet. 7 & n.4; Pet. App. A3 n.1) was presented with a dispute between petitioners and the State of Washington concerning the appropriate number of fall chinook that should be allowed to escape the in-river fisheries for spawning purposes. In general, petitioners and the State disagree over the number of spawners necessary to produce a maximum sustained harvest. In late 1982, the FAB developed a five-year interim plan designed to "probe" for the escapement level that would yield the maximum sustained harvest. The interim plan also would provide data

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Treaty of Dec. 26, 1854 (Medicine Creek), United States-Nisquallys Indians, 10 Stat. 1132 *et seq.*; Treaty of Jan. 26, 1855 (Point No Point), United States-S'Klallams Indians, 12 Stat. 933 *et seq.*; Treaty of Jan. 31, 1855 (Neah Bay), United States-Makah Tribe, 12 Stat. 939 *et seq.*; Treaty of Jan. 22, 1855 (Point Elliott), United States-Dwamish Indians, 12 Stat. 927 *et seq.*

to aid in evaluating the perennial disputes that arise between tribal and state biologists. This probing plan was in the nature of an experiment: a fixed 40% of the fall chinook in the three rivers involved would be harvested each year, provided that conservatively-established minimum spawning escapement levels were met to ensure conservation of the chinook stocks. Because the sizes of the runs over the next few years were expected to vary, the constant 40% harvest rate and concomitant 60% escapement rate were designed to produce a range of actual numbers of spawners — which could then be compared to year-by-year estimates of viable offspring, providing resource managers with some hard data in their attempts to estimate the optimal number of spawners. See Pet. App. D3. This interim plan was developed with virtually no cooperation from the State of Washington, and the State did not contest the plan in district court.[2]

In 1983, however, the State objected to the continued implementation of the FAB interim plan. Specifically, the State argued that harvestable fish must be split 50-50 between the treaty fishery and the in-river non-Indian sports fishery, even though the sports fishery cannot catch more than a fraction of the State's harvestable share. Under the State's view, the State may devote its share of the harvestable fish to "non-harvest" uses, including extra escapement to improve the runs, to add to the food chain of wild animals, and to provide additional "opportunity" to sport fishers. The State thus argued that the 40% harvest rate must be decreased (and the 60% escapement rate increased) to the degree that the non-Indian river sport fishery is unable to harvest its share. Pet. App. D1-D2 (Queets River).

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[2]The United States did not participate as a formal party in the 1982 FAB proceeding.

Petitioners, on the other hand, argued that the 40% fixed harvest rate was an essential premise of the FAB plan for probing for maximum sustained yield and escapement levels. Pet. App. D3. Petitioners also contended that, within the 40% harvest rate, fish determined unharvestable by one party may legally be harvested by the other. *Ibid.* Petitioners argued that, if they were not allowed to catch that portion of the harvest that the non-Indian sports fishery is unable to catch, the 40% harvest rate necessary for purposes of the FAB experiment would not be achieved. *Id.* at D13.

The district court's technical advisor, in his reports on the 1983 fall chinook season on the Queets, Hoh, and Quillayute Rivers, recommended that the 40% harvest rate be construed and implemented in accordance with petitioners' position, *i.e.*, that within the 40% harvest rate fish determined to be unharvestable by one party could be harvested by the other party. Pet. App. D4-D5. The advisor noted that the 40% harvest rate, along with a "floor" escapement of 2,500 fall chinook, "is an integral part of a management plan which protects the resource and effectively probes towards [maximum sustained yield] escapement" (*id.* at D5). The advisor also noted that while petitioners' plan would reduce the number of fish available for sports fishermen, the numerical reduction in the estimated sports catch would be minimal compared to the estimated loss to tribal fishermen under the State's plan (sport fishermen loss of 22 fish under petitioners' plan for the Queets River compared to an estimated tribal loss of 900 fish under the State's plan). *Id.* at D6. Although the advisor did not accept the State's proposed plan, he did earmark for the sports fishery more than twice the number of fish that the State had estimated could be caught by sportsmen. See *id.* at D8.

In response to the advisor's recommendation, the State filed a "Request for Determination" with the district court, seeking a declaration that the non-Indian fishery cannot be

curtailed simply to achieve a level of catch considered desirable by the district court's technical advisor for scientific and economic purposes. On December 19, 1983, the district court entered a two-page order (Pet. App. C1-C2) adopting the advisor's recommendation.

2. The State appealed the district court's decision without seeking certification under Fed. R. Civ. P. 54(b) or 28 U.S.C. 1292(b). On June 5, 1984, the court of appeals denied petitioners' motion to dismiss the appeal for lack of jurisdiction (Pet. App. B2). The court of appeals reaffirmed this ruling in its decision on the merits (*id.* at A4-A7). The court held that the principle of finality should be applied with greater flexibility in the context of post-judgment orders, because the danger of piecemeal review is lessened once the underlying dispute has been resolved (*id.* at A5). The court also concluded that the State's appeal presented the only opportunity for meaningful review, because, by definition, the FAB plan approved by the district court would always be an "interim" plan (*id.* at A6).

With respect to the State's contention that the FAB plan conflicted with this Court's decision in *Fishing Vessel* insofar as that case held that the tribal catch may not exceed 50% of the harvestable fish, the court of appeals ruled that the 50% figure "should be viewed as a ceiling only when there is actual competition for use of the resource" (Pet. App. A10). If the non-treaty fishers choose not to "use" their share of the resource, the court held, the Indians should be permitted to take the otherwise unharvestable portion unless doing so would interfere with conservation. *Ibid.* In the present case, however, the court concluded that the State is in fact "using" its share of the resource by dedicating it to the sports fishery in order to provide a "sustained recreational experience" (*id.* at A11). Because the fixed 40% harvest rate called for by the FAB probing plan reduced the number of fish available for sports fishermen, the court of appeals held that the plan infringed on the

State's treaty rights despite the fact that the estimated decrease in the fish available for sportsmen was minimal.[3] The court ordered that, in the future, the FAB probing plan "must respect the State's right to allocate up to 50% of any harvestable run to the sports fishery without diminution for failure to harvest all available fish" (*id.* at A12).

ARGUMENT

Management of the Pacific Northwest anadromous resources and effectuation of the fishing rights of Indian and non-Indian fishermen present numerous complex problems, both technical and equitable. In the present action, a dispute arose between petitioners and the State over the level of escapement necessary to provide for maximum sustained harvest of fall chinook on the Queets, Hoh, and Quillayute Rivers. In order to resolve that factual dispute, a five-year experiment was undertaken under the auspices of the FAB to collect data and probe for the optimal escapement and harvest levels. Because the United States believed the FAB plan should be allowed to run its course, and because the plan was premised on a fixed 40% harvest rate, the government opposed the State's attempt to undercut the experiment after only one year of operation by raising after-the-fact "treaty allocation" issues. The court of appeals' decision, however, has altered the nature of the FAB probing experiment by requiring an adjustment to the plan to allow the State to allocate its share of the harvestable runs to the sports fishery. While we believe this ruling is inimical to the continuation of the five-year FAB plan, the

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[3]Although the court agreed with petitioners that waste of harvestable fish should be avoided, it held, in light of the uncertainty as to the maximum sustained harvest and escapement levels, that "the Tribes' contention that the State's non-harvest-use is waste is premature" (Pet. App. A11). At the same time, however, the court also held that the policy against waste must give way to the State's right to dedicate a portion of its allocation to the "inefficient sports fishery" (*ibid.*).

decision below does not conflict with any decision of this Court and does not squarely present any issue of broad importance warranting review by this Court.

1. As an initial matter, we note that the decision below is internally inconsistent: the court of appeals has agreed that the FAB five-year plan, designed to develop data and to probe for the maximum sustained harvest level of fall chinook on the rivers in question, should continue, but that it must be conducted prospectively in such a manner as to allow the State to dedicate its full share of the harvestable runs to the admittedly inefficient sports fishery for non-harvest uses. Yet the fixed 40% harvest rate, which is "an integral part of [the] management plan which * * * effectively probes toward [maximum sustained yield] escapement" (Pet. App. D5), cannot be realized unless petitioners are permitted to harvest the fish that cannot be harvested by the sports fishery. The court's invalidation of the FAB interim plan is particularly troublesome in view of the State's failure to contest the probing experiment in 1982 when the plan was formulated.

2. Nevertheless, we believe that further review of this controversy is not warranted. The court of appeals' decision was rendered in the context of a dispute over the best method by which to resolve the factual question of the maximum sustained harvest of fall chinook on the rivers in question. Until that question is settled, as noted by the court of appeals (Pet. App. A11), petitioners' contention that the State's non-harvest uses constitute waste is premature. An adequate record that demonstrates, as a matter of fact, that the State's dedication of its full share of the harvestable fish to the sports fishery leads to over-escapement of chinook salmon to the spawning grounds and consequential wastage of fish is a necessary predicate to petitioners' contention that they should be permitted to harvest fish in excess of their harvestable share. The court of appeals has remanded

the case to the district court with instructions to develop a plan that will produce the necessary data. *Id.* at A12.

Thus, the broader issue of "foregone opportunity" is not squarely presented in this case.[4] In some instances, the State may have legitimate non-harvest uses that do not result in wastage; in other instances, the State may not have a factual basis for a claim that its failure to harvest the non-Indian share of the harvestable fish is a legitimate "use" of the type protected from infringement. In the present case, the factual record is lacking with respect to the capability of the sports fishery, the extent of the ocean catch, and the issues of wastage and optimal escapement. Because the facts are not yet sharply focused, the underlying legal questions have not been fully defined.[5] We therefore believe that the present

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[4]In contrast, the Ninth Circuit has recently affirmed the "foregone opportunity" doctrine in *United States* v. *Washington*, 774 F.2d 1470 (1985), which involves Puget Sound salmon. In that case, the United States supported the tribes' position that the State should not receive an "equitable adjustment" when tribal fishermen catch more than 50% of the harvestable runs, as long as the fish were known to be *clearly* surplus to spawning escapement needs and would otherwise have been uncaught by the non-Indian fisheries. The Ninth Circuit generally agreed with the Indians, holding that no equitable adjustment is due when a party catches fish in excess of its share if it is shown that "(1) the fish taken in excess of its share were identified in-season and (2) the other side had notice that the excess fish would be harvested." 774 F.2d at 1480.

We note that, unlike the present case, in which the dispute is between the upstream nontreaty sports fisheries and the tribal fisheries located at the mouths of the rivers, the dispute in the Puget Sound case was between nontreaty commercial fishermen operating in the marine areas of Puget Sound and Indian fishermen who fish in freshwater and the inland areas where the salmon return to spawn (see 774 F.2d at 1473). It remains to be seen — perhaps after the collection of data from a revised FAB experiment in the instant case — how the two decisions will be reconciled.

[5]Correspondingly, while the matter is not entirely free from doubt, we believe the court of appeals' decision should not be interpreted as significantly curtailing the legal contentions that could otherwise be made in the context of a more fully developed factual showing.

case is an inappropriate vehicle by which to address the questions where, or under what circumstances, a tribe may harvest more than 50% of a harvestable fish run.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners also argue (Pet. 15-19) that the court of appeals' failure to dismiss the appeal in light of the absence of a certification pursuant to Fed. R. Civ. P. 54(b) by the district court warrants review by this Court. Although we argued below that the district court's order was not final in light of the fact that further proceedings were contemplated by the parties, we do not believe the court of appeals' contrary interpretation of the order merits review.

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